

ORDERED.

Dated: December 02, 2021

  
Caryl E. Delano  
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re:

Case No. 2:17-bk-01712-FMD  
Chapter 11

ATIF, Inc.,

Debtor.

\_\_\_\_\_/  
Daniel J. Stermer, as Creditor Trustee,

Plaintiff,

vs.

Adv. Pro. No. 2:18-ap-531-FMD

Old Republic National Title Insurance Company,  
Old Republic National Title Holding Company,  
Old Republic Title Companies, Inc., and  
Attorneys' Title Fund Services, LLC,

Defendants.

\_\_\_\_\_/  
**ORDER DENYING PLAINTIFF'S MOTION TO  
AMEND THE COMPLAINT TO CONFORM TO EVIDENCE**

THIS PROCEEDING came before the Court to consider Plaintiff's *Motion to Amend the Complaint to Conform to Evidence* (the "Motion to Amend")<sup>1</sup> and the OR Defendants'<sup>2</sup> response to the Motion to Amend (the "Response").<sup>3</sup> Because the amendment requested by Plaintiff would be futile, the Court will deny the Motion to Amend.

## I. BACKGROUND

On March 2, 2017, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code.<sup>4</sup> On July 5, 2018, the Court entered an *Order Confirming Second Amended Chapter 11 Plan Filed by Official Committee of Unsecured Creditors*,<sup>5</sup> and Plaintiff, Daniel J. Stermer, was appointed as the Creditor Trustee.

On October 16, 2018, Plaintiff commenced this adversary proceeding by filing his original complaint,<sup>6</sup> and on February 26, 2020, Plaintiff filed a *Corrected Third Amended Adversary Complaint* (the "Complaint").<sup>7</sup> In the Complaint, Plaintiff alleges

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<sup>1</sup> Doc. No. 442.

<sup>2</sup> Generally, defined terms used herein have the same definition as set forth in the Court's March 29, 2021 *Findings of Fact, Conclusions of Law, and Memorandum Opinion Regarding Reasonably Equivalent Value* (Doc. No. 484). The OR Defendants are Old Republic National Title Insurance Company ("OR Title"), Old Republic National Title Holding Company ("OR Holding"), Old Republic Title Companies, Inc. ("OR Companies"), and Attorneys' Title Fund Services, LLC ("ATF Services").

<sup>3</sup> Doc. No. 446.

<sup>4</sup> Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

<sup>5</sup> Main Case, Doc. No. 338.

<sup>6</sup> Doc. No. 1.

<sup>7</sup> Doc. No. 162.

that Debtor fraudulently transferred tangible and intangible property to OR Title in December 2015 (the “2015 Transfers”). Plaintiff alleged that the 2015 Transfers included Debtor’s trade and service marks (the “Marks”) including the trade name “The Fund.” In the Complaint, Plaintiff seeks to avoid the 2015 Transfers as actually and constructively fraudulent transfers under 11 U.S.C. § 548 and Florida’s Uniform Fraudulent Transfer Act (“FUFTA”).<sup>8</sup>

The Court scheduled a trial on the Complaint for the week of February 15 through 19, 2021.<sup>9</sup> By agreement of the parties, the trial was limited to the issue of whether Debtor had received reasonably equivalent value in exchange for the 2015 Transfers (the “REV Trial”). On February 5, 2021, shortly before the REV Trial, Plaintiff and the OR Defendants filed a *Joint Supplemental Pre-Trial Stipulation and Statement of Disputed Facts and Issues*.<sup>10</sup> The stipulated facts included the following:

129. In or about June 2011, Debtor transferred all of its trade and service marks (including marks relating to the “Fund”) (collectively, the “Marks”) to its equity owner, ATIF Trust.

130. Pursuant to an Intellectual Property Assignment, which was entered into in connection with and contemporaneously to the Master Agreement, the Marks were transferred from the ATIF Trust (not Debtor) to OR Title in 2015.

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<sup>8</sup> Fla. Stat § 726.105.

<sup>9</sup> Doc. No. 318. The trial actually began on February 16, 2021, due to the Presidents’ Day federal holiday.

<sup>10</sup> Doc. No. 370.

On February 18, 2021, the third day of the REV Trial, Plaintiff filed the Motion to Amend, asserting that the evidence at the REV Trial had established that (a) Debtor transferred the Marks to its parent company, ATIF Trust, in 2011 (the “Initial Transfer”); (b) the Initial Transfer was fraudulent; and (c) ATIF Trust transferred the Marks to OR Title in connection with the 2015 Transfers.<sup>11</sup> Plaintiff seeks leave of Court to amend the Complaint to conform the pleadings to the evidence and to seek avoidance of the Initial Transfer as an actually fraudulent transfer.

Specifically, Plaintiff alleges that four “badges of fraud” conclusively establish that Debtor intended to defraud its creditors when it made the Initial Transfer to ATIF Trust: (a) the Initial Transfer was a transfer to an insider; (b) Debtor retained possession and control of the Marks after the 2011 Initial Transfer; (c) Debtor concealed the Initial Transfer by representing that it held the Marks in an October 2011 Amended and Restated Joint Venture Agreement (the “Amended JVA”) between Debtor and OR Title’s parent company, OR Holding;<sup>12</sup> and (d) Debtor received no consideration from ATIF Trust for transferring the Marks.<sup>13</sup>

Finally, Plaintiff alleges that he is not barred from asserting the fraudulent transfer claim by the two-year limitations period under 11 U.S.C. § 548 or the four-year limitations period in Fla. Stat. § 726.110; Plaintiff contends he is entitled to stand

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<sup>11</sup> Doc. No. 442, pp. 1-2.

<sup>12</sup> Doc. No. 427, Defendants’ Ex. 26, pp. 2-18.

<sup>13</sup> Doc. No. 442, pp. 7-8.

in the shoes of one of Debtor's creditors, the Federal Deposit Insurance Corporation (the "FDIC"), and to use the FDIC's six-year statute of limitations for avoiding fraudulent transfers.<sup>14</sup>

In the Response, the OR Defendants argue that Plaintiff is not permitted to use the FDIC's statute of limitations and is therefore barred from filing an action to avoid the Initial Transfer by the limitations period under FUFTA,<sup>15</sup> and that, at the REV Trial, Plaintiff did not prove Debtor's fraudulent intent in transferring the Marks to ATIF Trust. Plaintiff contends, first, that the Initial Transfer was made for the legitimate purpose of protecting the Marks during the negotiation of the Amended JVA; and second, that Plaintiff "conceded" that Debtor was solvent in 2011 and, therefore, cannot show that the Initial Transfer to its parent was fraudulent.<sup>16</sup>

After the REV Trial, the Court entered its *Findings of Fact, Conclusions of Law, and Memorandum Opinion Regarding Reasonably Equivalent Value* (the "REV Ruling").<sup>17</sup> In the REV Ruling, the Court found that Plaintiff had not met his burden of proof to establish that Debtor's 2015 Transfers were for less than reasonably equivalent value – a required element of a claim to avoid a transfer as constructively fraudulent

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<sup>14</sup> Doc. No. 442, p. 9, n. 5.

<sup>15</sup> Doc. No. 446, pp. 7-9.

<sup>16</sup> Doc. No. 446, p. 5.

<sup>17</sup> Doc. No. 484.

and a “badge of fraud” to avoid a transfer as actually fraudulent under both 11 U.S.C. § 548 and FUFTA.<sup>18</sup>

Contemporaneously with this Order, the Court is entering its *Order (1) Denying Plaintiff’s Omnibus Motion for Partial Summary Judgment and (2) Granting Defendants’ Motion for Summary Judgment* (the “SJ Order”). In the SJ Order, the Court determined that the 2015 Transfers are not avoidable as actually fraudulent transfers because (a) Plaintiff did not establish sufficient “badges of fraud” to prove fraudulent intent, and (b) the 2015 Transfers were made for the legitimate, independent purpose of obtaining reinsurance of Debtor’s title policy liabilities.

## **II. ANALYSIS**

Plaintiff filed the Motion to Amend under Federal Rule of Civil Procedure 15(b)(1). Rule 15(b)(1) provides:

### **(b) Amendments During and After Trial**

**(1) Based on an Objection at Trial.** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.<sup>19</sup>

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<sup>18</sup> Doc. No. 484, p. 31.

<sup>19</sup> Fed. R. Civ. P. 15(b)(1), made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7015.

The rule governs amendments to pleadings that are proposed during and after trial. “The purpose of Rule 15(b) is to authorize amendments to conform the pleadings to issues or evidence that appear for the first time at trial.”<sup>20</sup> A court may deny a motion under Rule 15(b)(1) if the proposed amendment would be “an exercise in futility.”<sup>21</sup> A proposed amendment is futile “if the complaint, as amended, would be subject to dismissal.”<sup>22</sup>

Here, the proposed amendment to the Complaint would be futile for two reasons: first, because the Initial Transfer is outside the look-back period for avoiding fraudulent transfers under § 548 and Fla. Stat. § 726.110; and second, because avoidance of the Initial Transfer is only an intermediate step toward the relief actually sought by Plaintiff, and the Court has ruled that the 2015 Transfers are not avoidable.

**A. The Initial Transfer is outside the look-back period for avoiding fraudulent transfers under § 548 and Fla. Stat. § 726.110.**

Plaintiff acknowledges that the 2011 Initial Transfer is outside the two-year and four-year look-back periods for avoiding fraudulent transfers under § 548 and Fla. Stat. § 726.110. However, Plaintiff asserts that he is “not barred by the statute of

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<sup>20</sup> *In re Northwest Territorial Mint, LLC*, 591 B.R. 852, 867 (Bankr. W.D. Wash. 2018) (quoting *Equal Employment Opportunity Commission v. Hay Associates*, 545 F. Supp. 1064, 1070 (E.D. Penn. 1982)).

<sup>21</sup> *In re Northwest Territorial Mint, LLC*, 591 B.R. at 867 (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)).

<sup>22</sup> *In re Pixius Communications, LLC*, 2021 WL 1045173, at \*4 (Bankr. D. Kan. Feb. 1, 2021) (quoting *Farmers Bank & Trust, N.A. v. Witthuhn*, 2011 WL 5290941, at \*2 (D. Kan. Nov. 28, 2011)).

limitations” because he may stand in the shoes of the FDIC and use the FDIC’s six-year statute of limitations.<sup>23</sup>

Plaintiff appears to rely on the limitations period provided by 12 U.S.C. § 1821(d)(14), titled “Statute of limitations for actions brought by conservator or receiver.”<sup>24</sup> Under the statute, the FDIC may bring an action on a contract claim within the longer of (1) six years from the date the claim accrues, or (2) the applicable limitations period under state law. But the statute—known as an *Extender Statute*—applies to claims that arose *before* the FDIC was appointed as receiver for a failed institution.

The purpose of the Extender Statute is to provide the FDIC with time after its appointment to investigate claims held by the failed institution and determine which actions it should bring on the institution’s behalf.<sup>25</sup>

The FDIC Extender Statute works by hooking any claims that are live at the time of the FDIC’s appointment as receiver and pulling them forward to a new, federal, minimum limitations period – six years for contract claims, three years for tort claims. *See Barton*, 96 F.3d at 132 (“Th[e FDIC Extender S]tatute, however, does not allow the [FDIC] to bring a state law claim that had expired before the [FDIC] was appointed receiver.”).<sup>26</sup>

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<sup>23</sup> Doc. No. 442, p. 9, n. 5.

<sup>24</sup> 12 U.S.C. § 1821(d)(14).

<sup>25</sup> *Federal Deposit Insurance Corporation v. Barton*, 96 F.3d 128, 133 (5th Cir. 1996).

<sup>26</sup> *Federal Deposit Insurance Corporation v. RBS Securities Incorporated*, 798 F.3d 244, 249 (5th Cir. 2015).



The two-step inquiry under the Extender Statute asks first whether the claim was viable under state law on the date of the FDIC's appointment as receiver, and second, whether the FDIC filed its action within the limitations period under the Extender Statute.<sup>27</sup>

But the Extender Statute does not apply to claims that arise *after* the FDIC's appointment as receiver for an institution<sup>28</sup> because as to claims that arise while the FDIC is already in place as receiver, the FDIC is in the same position to investigate the claim as any other affected party would be. In other words, as to post-receivership claims, the FDIC is not prejudiced by an otherwise applicable statute of limitations.

In *In re Kipnis*,<sup>29</sup> the only case cited by Plaintiff to support his use of a six-year statute of limitations, the bankruptcy court held that a chapter 7 trustee could step into the shoes of the Internal Revenue Service to take advantage of a statutory ten-year collection period. But the applicable statute in *Kipnis* – which allows the Internal Revenue Service to collect taxes for ten years after assessment<sup>30</sup> – operates differently

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<sup>27</sup> *Federal Deposit Insurance Corporation v. Hall*, 2016 WL 7340304, at \*2-3 (M.D. Fla. Aug. 16, 2016); *Federal Deposit Insurance Corporation v. Cameron*, 986 F. Supp. 2d 1337, 1340 (N.D. Ga. 2013).

<sup>28</sup> See, e.g., *Beckley Capital Ltd. Partnership v. DiGeronimo*, 184 F.3d 52, 57-58 (1st Cir. 1999) (The Extender Statute has little force to a note that is not in default when the FDIC assigns the claim.)

<sup>29</sup> 555 B.R. 877 (Bankr. S.D. Fla. 2016).

<sup>30</sup> 30 26 U.S.C. §§ 6502(a)(1), 6901(a).

from an “extender statute” designed to prevent an existing claim from lapsing before an agency has an opportunity to investigate.

Here, the FDIC was appointed as the receiver for Washington Mutual Bank (“WaMu”) on September 25, 2008.<sup>31</sup> The FDIC filed its claim in Debtor’s case, seeking reimbursement for losses incurred by WaMu as a result of the breach, fraud, or dishonesty of one of Debtor’s agents in connection with a real estate closing. But the Initial Transfer occurred in June 2011, almost three years after the FDIC’s appointment as receiver.

Because the Initial Transfer occurred *after* the FDIC’s appointment as receiver, there is no need to “extend” the statute of limitations for the FDIC to bring a fraudulent transfer claim, and therefore Plaintiff may not use the FDIC’s Extender Statute to avoid the Initial Transfer.

**B. The proposed amendment is futile because it would afford Plaintiff no relief.**

Even if Plaintiff were to prevail on his proposed claim to avoid Debtor’s Initial Transfer of the Marks to ATIF Trust—such that Debtor continued to own the Marks after 2011—the Court has determined in the REV Ruling and the SJ Order that Debtor’s transfer of the Marks to OR Title in 2015 was neither actually nor constructively fraudulent. Therefore, any amendment of the Complaint to seek

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<sup>31</sup> Main Case, Claim No. 26-1, p. 4.

avoidance of the Initial Transfer would be futile as it would provide no recovery for Plaintiff.

### **III. CONCLUSION**

For the foregoing reasons, the Court finds that any amendment of the Complaint to seek avoidance of the Initial Transfer is futile because (a) all claims to avoid the Initial Transfer as a fraudulent transfer are time-barred, and (b) under the Court's REV Ruling and SJ Order, avoidance of the Initial Transfer would provide no relief to Plaintiff.

Accordingly, it is

**ORDERED** that Plaintiff's *Motion to Amend the Complaint to Conform to Evidence* (Doc. No. 442) is **DENIED**.

Clerk's Office to serve on interested parties via CM/ECF.